

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

ASARCO, LLC, a Delaware corporation,)	
)	
Plaintiff,)	Case No. 4:11-cv-00864-JAR
)	
v.)	
)	
NL INDUSTRIES, INC., et al.,)	
)	
Defendants.)	
)	

**DEFENDANTS' STATUS REPORT ON GOVERNMENT'S
REMEDIAL PROCESSES**

Pursuant to the Court's Memorandum and Order dated March 11, 2013, the undersigned Defendants, by their respective counsel, submit the following status report on the government's remediation processes with regard to the Southeast Missouri Lead Mining District (the "SEMO Sites") but limited to areas where the undersigned Defendants are allegedly connected:

- The SEMO Sites cover large parts of multiple counties, including St. Francois, Madison, Iron, and Reynolds counties and contain multiple mining sub-districts, including Old Lead Belt, Mine LaMotte-Fredericktown, Viburnum, Indian Creek, and Shirley-Palmer.
- EPA has designated many of these mined areas as Superfund Sites, including Big River Mine Tailings, Madison County Mines, Washington County Lead District, among others.
- Each of EPA's designated Superfund Sites typically consists of multiple mines or mined areas.
- Each of the mines or mined areas designated as Superfund Sites typically consist of multiple Operable Units.

Anschutz Mining Corp. is alleged to be involved only in a small portion of the overall SEMO Sites investigation and remedial activities at only one sub-site, known as OU2, which includes the Madison Mine currently owned by Anschutz Mining Corp.

NL Industries, Inc. ("NL") is alleged to be involved in only a very small portion of the overall SEMO Sites investigation and remedial activities with past or current activity allegedly at

only three sub-sites, the National Pile (within the Big River Mine Tailings Site), the Anschutz sub-site (Madison Mine-Fredericktown) within the Madison County Mines Site, and the Northern Madison County Unit (Mine LaMotte) within the Madison County Mines Site.

St. Francois County Environmental Corporation has been involved only at the Big River Site.

Union Pacific Railroad Company has not been named as a responsible party by EPA at any of the SEMO Sites and is not presently aware of any activities being undertaken by EPA.

UPDATE

- At the National Pile, one of eight sites within the Big River Mine Tailings Superfund Site, NL with another company, Doe Run, is completing a Non-Time Critical Removal Action. Similar actions are underway or have been completed at the other seven mine sites. As noted previously, NL along with two other potentially responsible parties recently received a Special Notice Letter pursuant to Section 122(e) of CERCLA, 42 U.S.C. § 9622(e), from EPA for residential clean-up (OUI) of some 4,000 residences across the entire Big River Mine Tailings Site area at a present value cost of over \$107 million. NL remains in good faith negotiations with regard to the Notice, although it is allegedly responsible for only a small share of the overall residential clean-up. Additionally, EPA has designated an Operable Unit 2, which will address terrestrial ecological risks and impacts to watersheds associated with mines and waste areas, *i.e.*, impacts to river sediments and surface waters. EPA has not completed its investigation and no remedy has yet been proposed for Operable Unit 2 at the Big River Site. The government continues to diligently work to address terrestrial contamination issues at the Big River Mine Tailings Superfund Site. *See*

<https://www.fbo.gov/?s=opportunity&mode=form&tab=core&id=487b1ff35eba12614e2f9222f2bed07b&cview=1> [August 25, 2014 Amendment to soil removal contract at Big River Mine Tailings Site]

- Federal and State Natural Resource Trustees continue to actively assess damages to natural resources in support of their claims under 42 U.S.C. § 9607(a)(4)(C) for damages to the environmental resources over the large area and waterways associated with the Big River Mine Tailings Site and the SEMO Site overall, the clean-up and costs of which will not be known or occur for some years into the future. Those activities are active and ongoing. For example, the government has recently issued the following reports: Preassessment Screen and Determination; Madison County Mines Site, Madison County, Missouri (June 2014); Southeast Missouri Request for Proposals for Riparian, Wetland, and Floodplain Restoration (October 2014); Environmental Implications of Phosphate-Based Amendments in Heavy Metal Contaminated Alluvial Soil (November 6, 2014, 79 pages). *See* <http://www.fws.gov/Midwest/es/ec/nrda/SEMONRDA/index.html> (last visited 3-2-2015).

- On July 3, 2014, the U.S. Department of Interior, on behalf of itself and the Missouri Department of Natural Resources, sent a Notice of Intent to Perform and Invitation to Participate in a Natural Resource Damage Assessment at the Madison County Mines Superfund Site and Surrounding Area (“Notice of Intent to Perform”) to all PRPs: Anschutz Mining Corporation, Delta Companies, Inc., The Doe Run Resources Corporation d/b/a The Doe Run Company, and NL Industries, Inc., notifying the PRPs that a Preassessment Screen has been conducted. Based upon the Preassessment Screen, the Trustees have determined that the specified criteria in Section 11.23(e) of the NRDA regulations have been met and based upon an evaluation of the five criteria, the Trustees have determined that a NRDA is warranted at the Madison County Mine Site.
- On August 5, 2014, NL, by and through Archer & Greiner, P.C., responded to the U.S. Department of Interior’s Notice of Intent to Perform, notifying it that NL is interested in cooperating with the Trustees, that NL is interested in discussing with the Trustees potentially entering into a cooperative assessment agreement, and NL is willing to make representatives available for a telephone conference or in-person meeting.
- On August 15, 2014, the U.S. Department of Interior responded to NL’s August 5, 2014 letter, advising that per “CERCLA natural resource damage assessment and restoration (NRDAR) regulations, the next step after Notice of Intent to Perform a natural resource damage assessment (including the Preassessment Screen) is to develop an Assessment Plan.” The Trustees are developing the draft Madison County Mines Site Assessment Plan and will make the draft plan available for public review and comment. The plan will explain the assessment activities, including the geographic extent of the assessment and the nature and extent of any injury. The Trustees are unable to answer any questions as to the nature and extent of the assessment until the draft plan is developed and made available to the public. The Trustees will notify NL of the release of the draft plan and identify dates and times for a discussion concerning a cooperative assessment agreement after the release of the draft plan. The creation of the assessment plan by the trustees is underway. NL has not yet received the Madison County Mines Site Assessment Plan from the trustees.
- At the Madison County Mines Superfund Site, EPA is involved in a wide range of activities at various stages of development for the seven Operable Units, including cleanup of Residential Soils (OU3) and various Assessments, Remedial Investigations, and Feasibility Studies at OU1, OU2, OU3, OU4, OU5, and OU6. EPA has also designated an OU7 LSFR Watershed at the Madison County Mines Superfund Site. LSFR is the designation for the Little St. Francois River. According to the CERCLIS database, EPA has not begun the study of that OU, but future study is expected. Follow-up action by the EPA for those matters is anticipated to occur over years into the future with responsibility and significant

costs yet to be determined. At the Northern Madison County Unit (OU1), Mine LaMotte, NL, along with the other alleged potentially responsible party, completed some time ago a limited Site Characterization and Risk Assessment. Additional activities may be pursued by the EPA in the future. As of this date, Records of Decision (“RODs”) for OU3, OU4 and OU5 have been issued with respect to the seven Madison County OUs. The remaining four OUs will be addressed according to US EPA, in future RODs for remedial action.

As the Court should note, as of March 11, 2015, activities are proceeding at the Big River and Madison sites as expected. *See e.g.*

<http://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.CleanupActs&id=0701639>

and

<http://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.CleanupActs&id=0701102>.

ANCILLARY INFORMATION

In its March 11, 2013 Memorandum and Order, this Court found good cause “to stay this action with regard to any apportionment or damages determination ... until further order of the Court.” *See* March 11, 2013 Memorandum and Order (Docket No. 141) at page 6. In numerous prior six month reports to this Court, Asarco argued that the partial stay granted by this Court should be lifted. *See e.g.* Plaintiff’s September 11, 2014 Status Report on Government Remediation (Docket No. 274); Plaintiff’s March 11, 2014 Status Report on Government Remediation (Docket No. 203); Plaintiff’s September 11, 2013 Status Report on Government Remediation (Docket No. 159).

As this Court is aware, the identical issues presented on the stay issue were also present in the litigation captioned *ASARCO, LLC v. NL Industries, Inc., et al.* (United States District Court, Western District of Missouri, Case No. 4:11-cv-00138-DGK). In a ruling dated March 18, 2013 Judge Beth Phillips issued a stay in favor of NL and the other defendants, and delineated the scope of the stay as follows:

Defendants move to stay until the EPA makes a final determination of the Tri-States remedy, NRD are determined, and the United States’ claims have concluded. However, the Court finds that the better course is to reconsider this stay upon a showing of good cause. The parties shall not move to lift this stay until either: 1) the EPA has completed its investigation, selected a final remedy for the Tri-States area, and NRD are determined; or 2) all of the parties in this case have resolved their total liabilities with the government and/or with each other.

On September 24, 2014, Asarco filed in the Western District of Missouri a Motion to Lift Stay Or For Certification For Interlocutory Appeal to the United States Circuit Court of Appeals for the Eighth Circuit. On October 10, 2014, NL and the other defendants filed a Suggestion in

Opposition to Asarco's Motion to Lift Stay Or For Certification For Interlocutory Appeal in the Western District of Missouri. In an Order dated January 22, 2015, Judge Beth Phillips denied Asarco's Motion to Lift Stay, but granted Asarco's Motion for Certification for Interlocutory Appeal. On February 2, 2015, Asarco filed a Petition for Permission to Appeal with the Eighth Circuit Court of Appeals, Case No. 15-8001. NL and the other defendants filed an opposition on February 11, 2015. On March 2, 2015, a three judge Panel of the Eighth Circuit Court of Appeals unanimously denied Asarco's Petition for Permission to Appeal, thereby confirming the appropriateness of the stay granted by Judge Philips under the identical facts presented here, and the partial stay granted by this Court in its March 11, 2013 Order. Defendants request that before any further determination is made to lift the partial stay granted by this Court in the March 11, 2013 Order, Defendants have full opportunity to be heard on any issues presented.

March 11, 2015

Respectfully submitted,

/s/ Joel L. Herz

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CERTIFICATE OF SERVICE

I certify that on the 11th day of March, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

/s/ Joel L. Herz

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